

BAUMGARDNER

vs.

THE BIG MOUNTAIN IMPROVEMENT CO.

ADDITIONAL BRIEF FOR APPELLANTS.

I. There was no occasion for the other side to adduce authorities to establish the general doctrine, that “the ancient jurisdiction of the Courts of Equity is not destroyed, because courts of law exercise that jurisdiction which they did not exercise years ago,” (*Kemp vs. Pryor*, 7 Vesey, 237, *per* ELDON, C.) but the rule is not true without qualification. Mr. Spence, devotes an entire book (Book IV., Vol. 1, 684, *et seq.*) of his treatise on the Equitable Jurisdiction of the Court of Chancery to the Obsolete Jurisdiction of the Court of Chancery; and he sums up the discussion by observing: “the foregoing are the principal instances of what may be called the obsolete jurisdiction of the Court of Chancery in regard to civil rights and liabilities. By reason of the improvement in the administration of justice in the ordinary courts, and the extension of the action on the case, the necessity for the interference of the Court of Chancery in these cases has long since ceased, and the general principle which we have before noticed, which was always recognized in theory,—that where there is claim in respect of a legal right or liability, and the remedy at law is appropriate and effectual on the one hand, and there is no obstruction to a valid defence at law on the other, the Court of Chancery will not interfere—may now be considered as completely established.” The introduction of the modern action of ejectment took

from the Court questions relating to real estate, and so the extension of the action on the case; the fiction of laying the venue by a *videlicet*, and the practice of granting new trials, rendered application to chancery unnecessary, and, therefore, inadmissible.

And this principle is not yet abandoned, nor is the rule of *Kemp vs. Pryor* followed implicitly even in regard to the subject-matter of controversy. For example, a Court of Equity in this city would not take jurisdiction of a suit on a promissory note, if the only discovery asked, was whether the defendant did or did not sign the note sued on; because under the affidavit of defence law, he must admit or deny the execution. So in a suit against an alleged partner, if that were the only fact in dispute, a bill in chancery would hardly lie, if its only equity was discovery as to that fact, as the rules of Court compel the defendants to deny the partnership under oath before plea pleaded. Is it possible, that if, in either of these cases, the complainant obtained the discovery prayed for—that is, if the answer admitted the making of the note or the existence of the partnership, a Court of Equity would then, without more, proceed to determine the controversy, and so deprive the defendant of his constitutional right of trial by jury?

II. But the question involved in this appeal, is not touched by the rule of *Kemp vs. Pryor*, or the authorities cited by the other side. The encroachments of chancery were never so strenuously resisted as when the attempt was to interfere with the suitors in courts of law. It is true, that the right is as well established as any other prerogative of the Chancellor, but it is clear, that it has always been, and ought to be, exercised with the utmost caution. Every presumption is to be made in favor of the jurisdiction which has already taken cognizance of the subject matter of controversy; and the rule is, therefore, laid down in the strongest terms, that where an

equitable defence might have been set up, and was not, the judgment of a court of law, will not be set aside. *Harrison vs. Nettleship*, 2 M. & K., 423.

In applying this rule, it is obviously the duty of the Chancellor to keep himself informed of the changes in the practice of the courts of law, so as not to interfere with their judgments, except in cases of actual necessity. But if this be true in respect to suits already decided, it must be equally so, as to those pending. The doctrine, so fully illustrated on pp. 18 and 19 of our first argument,—that as between courts of concurrent jurisdiction, that which first had possession of the subject matter of controversy, must determine it conclusively—is as binding on Courts of Equity as upon courts of law. It is believed, that the true rule is, that a Chancellor should not restrain a proceeding at law unless upon the ground that in that particular proceeding, that particular court of law was incompetent, by reason of the then existing rules of practice and of the principles of law as then administered, to do complete justice as between the particular parties then and therein litigating.

Upon this point, attention is again requested to the decisions already cited from the Courts of New York, Massachusetts, and Ohio. See also, *Van Vleck vs. Clark*, 38 Barb., 316:—"It is not necessary now, to commence one action to stay proceedings in another. And where a party has a remedy which he neglects to apply for until it is too late to obtain the relief he wants, he should not afterwards, without any excuse for his delay in the first instance, be allowed to resort to a new action for that purpose."

And this view is sustained by the English Chancery decisions since the passage of the Common Law Procedure Act. In *Farebrother vs. Welchman*., 3 Drewry, 122, an injunction to restrain a suit at law, was refused upon this very ground; Kindersley, V. C., saying:—

“But when I find that by the new procedure act, a defendant is allowed to defend by matter of equitable defence, the very purpose of which enactment is to prevent a party from against whom an action is brought, from being driven to this court, it does appear to me, that when a defendant pleads such matter as I find here, I must assume, that if the facts are found in favor of the defendant, judgment must also be in his favor. * * *

If this court were to entertain the question, and it came, as it might ultimately, to be a pure question of fact, it really might happen that this court would have to direct an issue to try the very question which is already in issue.”

It is true, that it has also been held, that if the defendant applies before pleading his equitable defence, and comes into equity in the first instance, an injunction may be granted (*Gompertz vs. Pooley*, 4 Drewry, 448,) but this is expressly upon the ground, that “the act is only permissive,” and that complete justice could not be done at law, “as there are many cases in which it would be very difficult to plead the equitable plea in such a way that a court of law can deal with the question, and it is a matter of great difficulty with a special pleader, whether he can fairly put the equitable defence in such a shape as to enable the defendant in a court of law, to have the benefit of that defence.” The language of the act is—“it shall be lawful for the defendant or plaintiff in replevin in any cause, in any of the superior courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea”—(17 & 18 Vict., c. 125, s. 83, 22 Stats. at Large, p. 454, 1854.) The same judge, however (*Kindersly*, V. C.), had decided in *Farebrother vs. Welchman*, that if the defend-

ant had already pleaded his equitable defence, he would not interfere, 3 Drewry, 122. Nor would he do so after verdict, though before judgment, *Tennig vs. Higgs*, 1 De G. & J., 388.

In *Magnay vs. Miner Royal Co.*, 3 Drew., 130, the defendant had been refused permission to plead his defence (18 Jurist., 1028,) on the ground that the plea did not disclose a complete equitable defence, and the court of law could not enforce the conditions on which solely the action should be stayed, and the vice-chancellor therefore granted the injunction. But as was said by the present lord chancellor, in the much contested case of *The Carron Iron Co. vs. Maclaren*, 35 Eng. Law & Eq. R., 51; 5 H. of L. C., 416:—"The result of the authorities is, that if the circumstances are such as would make it the duty of the court to restrain a party instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court. But though they will justify such a course, yet they will not, as I apprehend, make it the duty of the court so to act, *if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should be left to take their course.*"

This is the explanation of *Evans vs. Bembridge*, 8 De Gex, M. & G., 100, where an injunction was granted after a demurrer which did not meet the ground of the equitable plea. It is emphatically an appeal to the discretion of the Chancellor; and if adequate justice can not be obtained in the other form, then, and only then, will he interfere. "A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity; but the plaintiff must establish some special equitable ground of relief." *Harrison vs. Nettleship*, 2 M. & K. 423. See also *Jones vs. Geddes*, 14 Sim., 606: The Court will not interfere with proceed-

ings in Scotland, “*if the circumstances of the case render its interference inadvisable.*”

And for a full discussion of the whole subject, see the very elaborate opinion of Bennett, J., in *Bank vs. R. R. Co.*, 28 Vermont R. 470, *præsertim*, p. 477 *et seq.*; see also 2 Seton on Decrees, 877 *et seq.* (ed. of 1862); Hilliard on Injunctions, chapters VI. and XXVIII.

III. It is believed that it has been sufficiently shown that this application is to the discretion of the Court. It remains to demonstrate that no such case has been made out as calls for the relief prayed for.

(a.) The equities of complainant's bill are denied by the answer, and this alone is cause for dissolving the injunction: Hilliard, p. 88.

(b.) The defence is one which can properly be tried by a jury and enforced by a court of law: 2 Smith's L. C., 651; *Shaw vs. Beebe*, 35 Vt., 204; *Rangely vs. Spring*, 28 Me., 127; *Woods vs. Wilson*, 1 Wright, 379.

In *Rangely vs. Spring*, Whitman, C. J., shows very clearly that the doctrine of equitable estoppel is as binding on courts of law as of equity, and he cites the remark of Lawrence, J., in 6 Term R., 554: “I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land.”

(c.) But if there be a defence at law, a court of equity will not interfere: Hilliard on Injunctions, Ch. VI., sect. 10; *Philhower vs. Todd*, 3 Stockt. (N. J.), 54.

(d.) The question whether or not the plaintiff in an injunction is equitably estopped, is properly a question to be left to the jury, the Court declaring what the elements of an equitable estoppel are: 2 Smith's L. C., 757; *Forsyth vs. Day*, 46 Me., 176; *Adlin vs. Gove*, 41 N. H.,

465; *Gunn vs. Bates*, 6 Cal., 263; *Lewis vs. Carstairs*, 6 Whart., 207; 5 W. & S., 205.

“Estoppels which proceed on the ground of fraud or culpable silence, are facts for the jury, and not matters of legal construction for the courts: *Gunn vs. Bates*, *ut supra*.

(e.) Notwithstanding the intimation of the Court, the counsel for the appellants are still of opinion that this is not a case falling within the rule of equitable estoppel as laid down in any decision of authority to be found in the books; but conceding that it is, the evidence is certainly not of a character to specially commend the complainant to a court of equity. He entered as a wrongdoer, and claimed the land as his own down to the time of the completion of his improvements; but the uniform tenor of the authorities is, that “it should be shown that the language or conduct of the owner was the direct motive or inducement to the outlay or expenditure of the person who purchased the land, or made the outlay, so as to afford just ground for the inference that the wrong done by the former occasioned the loss incurred by the latter: *Ware vs. Cowles*, 24 Ala., 446; *Morton vs. Hodgdon*, 32 Me., 327; *The Cambridge Institution vs. Littlefield*, 6 Cush., 216; *Watkins vs. Peck*, 13 N. H., 360; *Darlington’s Appeal*, 1 Harris, 430; *Carpenter vs. Stilwell*, 1 Kernan, 61; 2 Smith’s L. C., 767.

IV. If it has been shown that a Chancellor, sitting in England, would not be compelled to interfere with the ejectment in this case—assuming, that is, that their courts of law were as competent as ours to do justice, nothing more is necessary. The grant of power conferred by the act of 1836 upon this court over corporations, is not an unlimited “supervision and control,” but “the jurisdiction and powers of a *Court of Chancery*, so far as relates to * * * , the supervision and control of all corpora-

tions." The complainant must begin, therefore, by showing that his case is one calling for the interposition of a Court of Chancery.

Nor is this affected by the act of 1852, for that statute simply authorizes the Supreme Court to exercise "original jurisdiction *in equity* throughout the state."

V. It being, then, a question of discretion, it is plainly the right and the duty of the court to consider the peculiar circumstances attending this application. It is not necessary to go to the length of saying that a Court of Equity in Pennsylvania will never interfere with a pending action at law, where under our practice equitable relief has heretofore been administered, but only that it will not do so where, as Mr. Spence says, "the remedy at law is appropriate and effectual on the one hand, and there is no obstruction to a valid defence at law on the other;" or as Lord Cranworth said, "if from any cause it appears likely to be more conducive to substantial justice that the proceedings should be left to take their course."

And while this may be laid down as a general rule, it is certainly worthy of note here, that this is a bill to restrain an action respecting real estate—to deprive the parties of their constitutional right of trial by jury—to do so by bill at *Nisi Prius*—and to do it in a case of all others the most proper for the consideration of a jury, and in which, substantial, complete, and perfect justice can be done by the local tribunal, as has been done in thousands of like cases before it. Before sustaining such a bill—introducing a practice so at variance with the customs of this Commonwealth, it is to be hoped that, the court will refer to the many eulogies upon the right of trial by jury in cases affecting titles to land, to be found in the recent reports, and consider, also, the practical results of transferring all ejectments, now pending, or hereafter to be brought, to the Court of *Nisi Prius* at Philadelphia. One of the results would possibly be, that the people of Pennsylvania would cause it to be understood, that they were not willing—"nostras leges mutari."

SAMUEL DICKSON.